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No. 2400.

United States Circuit Court of Appeals

Ninth Circuit

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

OREGON & CALIFORNIA RAILROAD COMPANY, a corporation, *et al.*,
Defendants and Appellants,

JOHN L. SNYDER, *et al.*,
Cross-Complainants and Appellants,

WILLIAM F. SLAUGHTER, *et al.*,
Interveners and Appellants,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR INTERVENERS AND APPELLANTS

ELMER L. HANCOCK AND OTHERS, AND R. E. CAMERON AND OTHERS.

JNO. MILLS DAY,
M. E. BREWER,
Solicitors and Attorneys for Interveners and Appellants.

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and

R. E. CAMERON, AND OTHERS.

STATEMENT.

On May 25th, 1908, the United States filed in the Circuit Court of the United States for the District of Oregon, its bill of complaint setting forth in substance that the Congressional land grant of July 25th, 1866, conveyed the odd numbered sections of land along the right of way of the railroad companies mentioned, to the California and Oregon Railroad Company in California and a company to be designated by the Legislature of Oregon, in Oregon.

Section 6 of the Act is as follows:

> "And be it further enacted, That the said companies shall file their assent to this act in the Department of the Interior within one year after the passage hereof, and shall complete the first section of twenty miles of said railroad and telegraph within two years and at least twenty miles in each year thereafter, and the whole on or before the first day of July, one

thousand eight hundred and seventy-five; and the said railroad shall be of the same gauge as the 'Central Pacific Railroad' of California, and be connected therewith."

Section 8 of the Act contained the following:

"And be it further enacted, That in case the said companies shall fail to comply with the terms and conditions required, namely, by not filing their assent thereto as provided in section six of this Act, or by not completing the same as provided in said section, this act shall be null and void, and all the lands not conveyed by patent to said company or companies, as the case may be, at the date of any such failure, shall revert to the United States."

This Act was amended by an act of Congress, approved June 25th, 1868, extending the time for the construction of the road.

On October 6th, 1866, steps were taken and proceedings had for the purpose of organizing a corporation, styling itself The Oregon Central Railroad Company. This Company will hereafter be called the West Side Company.

On October 10th, 1866, the Legislature of Oregon, by resolution, designated this Company as the grantee to take title under the grant of July 25th, 1866.

On July 6th, 1867, this Company duly filed its acceptance of the grant in the office of the Secretary

of the Interior, as required by the Act of July 25th, 1866.

In the meantime in April, 1867, a second company was organized, styling itself also the Oregon Central Railroad Company.

This company is hereafter referred to as the East Side Company. The East Side Company, after its organization, influenced the Legislature of Oregon to adopt and it did, on October 20th, 1868, adopt a joint resolution in which it stated that there was no company lawfully organized at the time of the adoption of its resolution of October 10th, 1866, and thereupon designated the East Side Company to take the grant. A controversy arose between these two companies as to which was entitled to the grant.

The time having elapsed in which the East Side Company could accept the grant, it applied to Congress, for, and on April 10th, 1869, obtained the enactment of the amendment of the Act of July 25th, 1866, by which amendment the time for the acceptance of the grant was extended until one year from that date. A proviso was incorporated into the amendment of April 10th, 1869, which proviso was as follows:

> "And provided, further, that the lands granted by the Act aforesaid shall be sold to actual settlers only, in quantities not greater than one-quarter section to one purchaser, and for a price not exceeding Two Dollars and Fifty Cents per acre."

On June 30th, 1869, after the approval of this amendment, the East Side Company filed in the office of the Secretary of the Interior, its acceptance of the grant, and proceeded with the construction of its line of railroad.

On March 17th, 1870, the defendant, Oregon and California Railroad Company, organized as a corporation to take over all rights which the East Side Company had acquired under and by virtue of the Act of July 25th, 1866, and the amendments thereto and expressly stated in its Articles of Incorporation that the purpose of its organization was to comply with all of the provisions of said Act.

On April 27th, 1870, the Oregon and California Railroad Company filed with the Secretary of the Interior, its acceptance of the grant of July 25th, 1866, and the amendments thereto. The East Side Company having conveyed all of its rights to the grant, and all of its property to the Oregon and California Railroad Company, became dissolved and disincorporated, on March 29th, 1870.

Thereafter on May 4th, 1870, the West Side Company, having abandoned its right to the grant of July 25th, 1866, and having applied to Congress, therefor, secured from Congress another grant of land. Concerning this grant of May 4th, 1870, to the West Side Company, we will hereafter have little to say, as we are concerned with the East Side grant only.

The East Side road was constructed and most of the land embraced within the grant has been conveyed by patent to the Oregon and California Railroad Company. Meantime the Oregon and California Railroad Company has secured title to the property of the West Side Company, including most of the lands granted to the West Side Company under the Act of May 4th, 1870, which were not forfeited to the Government for failure to construct the road.

Both the East Side and the West Side roads have been leased to the Southern Pacific Company.

The defendant, Oregon and California Railroad Company, having sold certain of the lands granted in violation of the terms of the proviso in the amendment of April 10th, 1869, and also in violation of a similar proviso in the act of May 4th, 1870, and having finally monopolized and refused to sell

any of the lands then remaining unsold, at any price, or on any terms, the Legislature of the State of Oregon, by joint resolution, asked Congress to compel the Railroad Company to sell the lands, as provided by the laws of April 10th, 1869, and May 4th, 1870.

Congress by joint resolution of April 30th, 1908, authorized and directed the Attorney General to bring this suit, which the Attorney General did by filing his complaint in equity in the suit at bar, September 4th, 1908.

In substance the relief asked for by the Government is as follows:

1st. That all of the lands remaining unsold in both grants be forfeited to the Government, or

2nd. That receivers be appointed to take and be invested with title to the lands and be directed to convey the lands as required by the laws of April 10th, 1869, and May 4th, 1870, or

3rd. That the Oregon and California Railroad Company be required by mandatory injunction to sell and convey the lands according to the law, and that those aggrieved by the refusal of the Railroad Company to convey the lands to them, might come in and obtain relief in their own behalf.

Then follows prayers for injunction, accounting, and other relief, which prayers do not concern the rights of these interveners and which they will not be called upon to discuss.

Both prior to and subsequent to the filing of the Government's complaint, many people, including these interveners, applied to the defendant, Oregon and California Railroad Company, to purchase various tracts of land as provided by the act of April 10th, 1869, and tendered full performance of all requirements of said Act.

These tenders being refused by the Railroad Company, these interveners applied for and obtained leave to file their bills in intervention and filed such bills, in which bills they asked that they be permitted to settle upon and purchase the lands by them tendered for respectively.

The defendants, Stephen T. Gage and the Union Trust Company, claim to have certain interest in or liens upon the lands, which liens, if any they have, the interveners claim to be junior and inferior to the rights of the interveners.

To these bills in intervention the defendants, Oregon and California Railroad Company, Southern

Pacific Company and Stephen T. Gage, Individually and as trustee, interposed demurrers upon the grounds; first, that the bills do not show that the matter in controversy exceeds, exclusive of interest and costs, the sum or value of two thousand dollars; second, that said bills do not show any cause or equity entitling the interveners to maintain their suit; third, that the bills do not show that the interveners are entitled to a discovery; and fourth, that the bills do not show that the interveners are entitled to any relief.

These demurrers were duly presented and on April 24th, 1911, overruled by the Court.

Thereafter on or about June 9th, 1913, Complainant filed its several motions to dismiss the bills of intervention of the interveners, for want of equity in such bills, which motion was on July 1st, 1913, sustained.

Thereafter on June 23rd, 1913, the Union Trust Company, individually and as trustee, filed its motion to dismiss the petitions in intervention and thereafter on the 25th of June, 1913, an order was entered by the Court sustaining said motion.

The evidence meanwhile having been adduced on behalf of the complainant and the defendants,

on July 1st, 1913, the Court entered a decree forfeiting the lands involved in the suit, including all lands claimed by the interveners, to, and quieting the title to the same in, the United States of America, and enjoining these interveners and others from claiming any interest therein.

From the various orders and decrees entered in favor of the complainant, all of the defendants, cross-complainants and interveners have prosecuted a joint appeal and from all orders and decrees entered in favor of the various defendants and against the cross-complainants and interveners, the cross-complainants have prosecuted a joint and several appeal.

From the numerous assignments of errors set up jointly and severally by the cross-complainants and interveners, those which we consider applicable to our cases and which we urge and rely upon are the following:

ASSIGNMENT OF ERRORS.

(Numbers in brackets are the numbers in the record.)

1. (91) The Court erred in sustaining the demurrer of the defendants, Oregon & California Railroad Company, Southern Pacific Company and Stephen T. Gage, individually and as Trustee, to

the bill of intervention of the intervener, Elmer L. Hancock, and the other interveners with him in his said bill joined, for want of equity in said bill, and

2. (92) The Court erred in sustaining the demurrer of the defendant, Union Trust Company, individually and as Trustee, to the bill of intervention of said interveners, for want of equity in said bill, and

3. (93) The Court erred in sustaining the motion of the defendants, Oregon & California Railroad Company, Southern Pacific Company and Stephen T. Gage, individually and as Trustee, to strike the bill of intervention of said interveners, for want of equity in said bill, and

4. (94) The Court erred in sustaining the motion of the defendant, Union Trust Company, individually and as Trustee, to strike the bill of intervention of said interveners, for want of equity in said bill, and

5. (95) The Court erred in sustaining the motion of the complainants for an order striking the bill of intervention of said interveners, and in granting and entering the order striking said bill, for want of equity in said bill, and

6. (96) The Court erred in not requiring the Oregon & California Railroad Company, Southern Pacific Company and Stephen T. Gage, individually and as Trustee, to answer said bill in intervention, and

7. (97) The Court erred in not requiring the Union Trust Company, individually and as Trustee, to answer said bill in intervention, and

8. (98) The Court erred in not requiring the complainant to answer said bill in intervention, and

9. (99) The Court erred in not granting to said interveners and each of them, the relief prayed for by them and each of them, respectively in said bill, and

10. (100) The Court erred in not granting to said interveners or any of them, any equitable relief.

As said bill of intervention contains allegations and matters entitling said interveners and each of them to equitable relief, and

Said bill of intervention contains allegations and matters entitling the said interveners, and each of them to the relief prayed for by them and each of them, respectively, in said bill.

11. (151) The Court erred in sustaining the demurrer of the defendants, Oregon & California Railroad Company, Southern Pacific Company and Stephen T. Gage, individually and as Trustee, to the bill of intervention of the interveners, R. E. Cameron, and the other interveners with him in his said bill joined, for want of equity in said bill, and

12. (152) The Court erred in sustaining the demurrer of the defendant, Union Trust Company, individually and as Trustee, to the bill of intervention of said interveners, for want of equity in said bill, and

13. (153) The Court erred in sustaining the motion of the defendants, Oregon & California Railroad Company, Southern Pacific Company and Stephen T. Gage, individually and as Trustee, to strike the bill of intervention of said interveners, for want of equity in said bill, and

14. (154) The Court erred in sustaining the motion of the defendant, Union Trust Company, individually and as Trustee, to strike the bill of intervention of said interveners, for want of equity in said bill, and

15. (155) The Court erred in sustaining the motion of the complainant for an order striking

the bill of intervention of said interveners, and in granting and entering the order striking said bill, for want of equity in said bill, and

16. (156) The Court erred in not requiring the Oregon & California Railroad Company, Southern Pacific Company and Stephen T. Gage, individually and as Trustee, to answer said bill in intervention, and

17. (157) The Court erred in not requiring the Union Trust Company, individually and as Trustee, to answer said bill in intervention, and

18. (158) The Court erred in not requiring the complainant to answer said bill in intervention, and

19. (159) The Court erred in not granting to said interveners and each of them, the relief prayed for by them and each of them, respectively in said bill, and

20. (160) The Court erred in not granting to said interveners or any of them, any equitable relief,

As said bill of intervention contains allegations and matters entitling said interveners and each of them to equitable relief, and

Said bill of intervention contains allegations and matters entitling the said interveners, and each

of them to the relief prayed for by them and each of them, respectively, in said bill.

21. (251) The Court erred in holding that these interveners and cross-complainants were not entitled to the relief prayed for by them and each of them, respectively, and

22. (252) The Court erred in not holding that these interveners and cross-complainants were entitled to the relief prayed for by them and each of them, respectively, and

23. (253) The Court erred in holding that none of these interveners and cross-complainants were entitled to the relief prayed for by them, and

24. (254) The Court erred in holding that none of these interveners and cross-complainants were entitled to any relief;

As their said bills of intervention and cross-complaint and each of them, contain allegations and matters entitling these interveners and cross-complainants and each of them, to equitable relief; and

Said bills of intervention and cross-complaint and each of them, contain allegations and matters entitling the interveners and cross-complainants and each of them, to the relief prayed for by them and each of them, respectively, in their said bills.

25. (255) The Court erred in holding that the United States, complainant herein, was entitled to a forfeiture of the lands or any of the lands sought to be purchased by the interveners and cross-complainants herein or any of them.

26. (256) The Court erred in not holding that the United States, complainant herein, was not entitled to a forfeiture of the lands or any of the lands sought to be purchased by the interveners and cross-complainants herein or any of them.

27. (257) The Court erred in holding that the lands or any thereof described in this decree, were and had been forfeited to the complainant, and that a decree be entered forfeiting said lands, or any thereof, to the complainant.

28. (258) The Court erred in holding that the lands sought to be purchased by the interveners and cross-complainants herein, should be forfeited.

29. (259) The Court erred in holding that the lands or any thereof sought to be purchased by these interveners and cross-complainants, or any of them, described in said decree, were and had been forfeited to the United States, complainant herein, and that a decree be entered forfeiting said lands or any thereof to the complainant.

30. (260) The Court erred in holding that the proviso in the said act of April 10th, 1869, was a condition subsequent.

31. (261) The Court erred in holding that the proviso in the amendment of April 10th, 1869, requiring the sale of lands to actual settlers only, in quantities not exceeding one-quarter section to any one purchaser and at a price not to exceed $2.50 per acre was or is a condition subsequent, the breach of which entitled the United States, complainant herein, to a forfeiture of the lands covered by said land grant.

32. (262) The Court erred in not holding that the proviso in the amendment of April 10th, 1869, requiring the sale of lands to actual settlers only, in quantities not exceeding one-quarter section to any one purchaser and at a price not to exceed $2.50 per acre, was not and is not a condition subsequent, the breach of which would entitle the United States, complainant, to a forfeiture of the lands covered by said grant.

33. (265) The Court erred in holding that the consequence and penalty of forfeiture was attached by Congress to a breach, should such there be, of the proviso of April 10th, 1869.

34. (266) The Court erred in holding that the consequence and penalty of forfeiture was intended by Congress to be attached to a breach, should such there be, of the covenant or proviso in the act of April 10th, 1869, requiring sales of land to settlers.

35. (271) The Court erred in holding that there was jurisdiction in the Court on the equity side to enforce a forfeiture of said East Side grant for the breach of an assumed condition subsequent if such there was, in said proviso of said act of April 10th, 1869.

36. (272) The Court erred in holding that there was jurisdiction in the Court on the equity side to decree a forfeiture of the title of the defendants to the lands embraced in and covered by the East Side grant, for breach of an assumed condition subsequent in the proviso contained in the act of April 10th, 1869.

37. (273) The Court erred in assuming jurisdiction on the equity side to enforce a forfeiture of the East Side grant for breach of an assumed condition subsequent in the proviso in the act of April 10th, 1869, as

(a) The effect of such assumption was to divest the interests of the interveners and cross-complain-

ants which had become vested, in parts of said East Side grant, under the terms of said proviso, and

(b) No declaration of forfeiture had ever been made by Congress prior to the vesting of such interest, and

(c) No declaration of forfeiture had been made by Congress prior to the entry of said decree, and

(d) No declaration of forfeiture had been made by Congress prior to the commencement of said suit.

38. (277) The Court erred in holding that by its joint resolution of April 13th, 1908, the Congress of the United States forfeited or intended to forfeit, or authorized the forfeiture by the Attorney General or intended to authorize the forfeiture by the Attorney General, or authorized or intended to authorize or empower the Court to forfeit or decree a forfeiture of the lands embraced within the East Side grant, for or on account of any assumed breach of conditions of the proviso of the act of April 10th, 1869.

39. (279) The Court erred in holding that there was any cause of action or foundation of jurisdiction for forfeiture in respect to either of said grants, in any re-entry for breach of condition or legislation

equivalent thereof, or in any legislative declaration of forfeiture.

40. (280) The Court erred in not holding that the proviso in the amendatory act of April 10th, 1869, requiring sales to settlers, was not sufficiently definite to be enforced as a condition subsequent;

As such proviso does not contain any words importing a right of forfeiture or re-entry for condition broken.

41. (281) The Court, being a court of equity, erred in decreeing a forfeiture to the complainant of all right and interest of the defendants in or to the lands embraced within the grant of 1866, for breach of the assumed condition contained in the amendment of April 10th, 1869, as

(a) Assuming that said proviso was a condition subsequent, for breach of which forfeiture could be had, such condition subsequent was and is also a covenant; and

(b) The complainant prayed in its bill of complaint for a specific performance of this covenant, and

(c) Such forfeiture was and is inequitable and should not be decreed by any court of equity where

there is any other means of doing justice between the parties; and

(d) The complainant prayed for specific performance of the covenant, and the Court should have granted such prayer, as by such performance justice and equity could have been done to all of the parties to the suit without forfeiture; and

(e) The Court was without jurisdiction to and it was inequitable for it to divest defendant, Oregon and California Railroad Company of title as trustee for the benefit of the interveners and cross-complainants, *sestui que trustant,* with interests vested prior to said decree; and

(f) In divesting the railroad company of title by forfeiture, the Court, in effect, imposed a penalty upon the railroad company to the extent of its interest in the land forfeited, to-wit: in the amount of $2.50 per acre for each acre of the land so forfeited, for and on account of the breach of its covenant, the imposing of which penalty is wholly inequitable, and

(g) By forfeiture the Court divested the vested interest of these interveners and cross-complainants and each of them, without any fault on their part or on the part of any of them, all of which is wholly inequitable.

42. (283) The Court erred in not holding that this suit cannot be maintained by complainant as one to enforce forfeiture nor to quiet title, as

(a) Neither the United States nor Congress has declared a forfeiture; and

(b) The fact of forfeiture had not been adjudicated by a court of law; and

(c) The defendant, railroad company, holds the legal title to and the possession of said granted lands; and

(d) Complainant having asked for forfeiture and in the alternative, for specific performance, this suit cannot be maintained for forfeiture, since equitable relief may be granted by specific performance; and

(e) In view of specific performance, a decree quieting title in the Government, cannot be had.

43. (284) The Court erred in not holding that the Government was estopped to claim forfeiture of the lands embraced within each and both of said land grants, as

(a) The Government in its bill of complaint bases its right to recover, upon the refusal of the railroad company to sell said lands to the inter-

veners and cross-complainants and others similarly situated, and

(b) The Government in its bill of complaint prayed that these interveners and cross-complainants might be permitted to enforce their rights herein; and

(c) The Government having come into a court of equity, is estopped to claim forfeiture when equitable relief by performance can be had; and

(d) The Government is estopped to claim forfeiture in lieu of performance, since the interveners and cross-complainants have come into court upon the invitation of the Government and furnished the means whereby performance may be had.

44. (285) The Court erred in holding that the provisions in each and both of said land grants concerning sales to settlers, are negative provisions only, designed to prevent sales to others than settlers in quantities greater than one-quarter section to any one purchaser and at prices greater than $2.50 per acre; and not positive provisions requiring sales to settlers in quantities not greater than one-quarter section to any one purchaser and at a price not greater than $2.50 per acre.

45. (286) The Court erred in not holding that the provisions of each and both of said land grants concerning sales to settlers were both positive and negative, requiring the grantee to sell to settlers, who should apply to buy, not more than one-quarter section, at a price not greater than $2.50 per acre, and requiring said grantee to refrain from selling any of the granted lands to others than settlers or in quantities greater than one-quarter section or at a price greater than $2.50 per acre.

46. (287) The Court erred in holding that the provisions in each and both of said land grants, requiring sales to settlers, are not positive covenants which may be specifically enforced.

47. (288) The Court erred in holding that the provisions in each and both of said land grants requiring sales to settlers, is a negative covenant only, which may be enforced by the Government only, and that the only means of such enforcement are by forfeiture for breach thereof.

48. (289) The Court erred in decreeing a forfeiture of those lands included in either or both of the grants to the railroad company or which the interveners and cross-complainants had made application to purchase from and tendered to the railroad com-

pany the sum of $2.50 per acre and offered to become actual settlers on the lands so applied for, prior to the adoption by Congress of the joint resolution of April 30th, 1908, as

By so applying, tendering the purchase price and offering to become an actual settler upon the lands so applied for, each intervener and cross-complainant has acquired a vested interest in the land applied for, which cannot be divested by Congress, assuming that said provisions are conditions subsequent, and that the adoption of said joint resolution by Congress was a declaration of forfeiture for breach thereof.

49. (290) The Court erred in holding that although the provisions in each and both of said land grants were designated to devote the lands conveyed by said grants, to settlement and tillage and to prevent the monopoly of the land and that such grants were laws as well as grants, that notwithstanding the railroad company might defeat the purposes of the provisions requiring sales to settlers, by themselves monopolizing and holding the lands and refusing to sell them at all, and by refusing to sell any of them except to such persons and in such quantities as it saw fit within the price and terms provided in the grant.

50. (291) The Court erred in not holding that the purpose of the joint resolution of Congress of April 30th, 1908, was to authorize the enforcement of a forfeiture for any breach of an assumed condition subsequent in either of said land grants, as an alternative only, of the refusal of the railroad company to perform the covenants requiring sales to settlers, after such performance had been decreed by the Court.

51. (292) The Court erred in not holding that the joint resolution of Congress of April 30th, 1908, authorized the enforcement of forfeiture for any breach of an assumed condition subsequent in either of said land grants, only in the event that specific performance of the covenants in said grants, requiring sales to settlers, could not be enforced.

52. (293) The Court erred in not holding that the joint resolution of Congress of April 30th, 1908, authorized a forfeiture of the legal title of the railroad company for breach of an assumed condition subsequent in either of said land grants, only as a means of carrying into effect the covenants in said grants requiring sales to settlers.

53. (294) The Court erred in holding that at the time of the filing of the bill of complaint herein and

ever since, and for a long time continuously next prior thereto, the Oregon and California Railroad Company, did not have possession of said grants or either of them.

54. (295) The Court erred in not holding that at the time of filing of the bill of complaint herein, and ever since, and for a long time continuously next prior thereto, the Oregon and California Railroad Company had legal title and the possession of all lands of which forfeiture is sought by said bill of complaint.

55. (296) The Court erred in holding that the United States, complainant herein, is the owner in fee simple or in possession of said lands or any part thereof or entitled to said lands or entitled to the possession of the same or any part thereof, which are sought to be purchased by these interveners and cross-complainants or any of them.

56. (297) The Court erred in holding that, as a foundation for a suit to quiet its title to either of said grants, or any part thereof, the complainant was in possession of the said grants, or either of them, or any part thereof; and in holding that the Oregon and California Railroad Company did not have the possession of the same.

57. (298) The Court erred in holding as a foundation for a suit by complainant, to quiet its title to the said grants or either of them, or any part thereof, that the same had not been reduced to possession, and were unoccupied and vacant, and not in possession of said defendant, Oregon and California Railroad Company.

58. (299) The Court erred in not holding that the United States, complainant herein, is not the owner in fee simple, nor in possession of said lands or any part thereof, nor entitled to said lands, nor entitled to the possession of the same or any part of the same, which are sought to be purchased by these interveners and cross-complainants or any of them.

59. (300) The Court erred in holding that the complainant is the owner in fee simple, or in possession of said lands or any part thereof, or entitled to the possession of the same or any part thereof.

60. (301) The Court erred in holding that as a foundation for a suit to quiet its title to either of said grants, or any part thereof, the said complainant had legal title to the same, or either of them, or any part thereof; and in holding that the defendant, Oregon and California Railroad Company did not have the legal title to such grants.

61. (302) The Court erred in holding that the title of the United States of America, of or in said lands or estates in lands sought to be purchased by these interveners and cross-complainants or any of them, be or is by said decree, quited and confirmed, particularly as to any claim or claims of right, title and interest in, to or upon the same, in favor of these interveners and cross-complainants or any of them.

62. (303) The Court erred in holding that the lands and estates in lands in the said decree described, and which were sought to be purchased by the interveners and cross-complainants herein or any of them, either in whole or in part, now are forfeited to, or that the title to or any part thereof, has reverted to and now is revested in the United States of America, or that the same or any part thereof, now are the absolute property of the United States of America, or are free from any and all claim or claims of right, title or interest or lien in, to or upon the same or any part thereof, by or in favor of these interveners and cross-complainants or any of them.

63. (304) The Court erred in holding that the United States, complainant herein, was entitled to an injunction restraining the defendants or any of

them, from conveying to these interveners and cross-complainants, any of the lands sought to be purchased by them, respectively, upon the terms proposed by said interveners and cross-complainants, and upon the terms provided in the act of July 25th, 1866, and the act of April 10th, 1869, amendatory thereof.

64. (305) The Court erred in not holding that the United States, complainant herein, was not entitled to an injunction restraining the defendants or any of them, from conveying to these interveners and cross-complainants any of the lands sought to be purchased by them, respectively, upon the terms proposed by said interveners and cross-complainants and upon the terms provided in the act of July 25th, 1866. and the act of April 10th, 1869, amendatory thereof.

65. (308) The Court erred in holding that the United States, complainant herein, was entitled to any injunctive relief whatever as against these interveners and cross-complainants or any of them.

66. (309) The Court erred in holding that the United States, complainant herein, was entitled to a decree restraining these interveners and cross-complainants, or any of them, from claiming or as-

serting any right, title interest or lien in, to or upon the lands sought to be purchased by these interveners and cross-complainants, respectively.

67. (310) The Court erred in not holding that the United States, complainant herein, was not entitled to a decree restraining these interveners and cross-complainants or any of them, from claiming or asserting any right, title or interest or lien in, to or upon the lands sought to be purchased by these interveners and cross-complainants, respectively.

68. (311) The Court erred in holding that the title of complainant to the said lands, or any part thereof, should be quieted.

69. (312) The Court erred in holding that the United States, complainant herein, was entitled to a decree quieting and confirming in it the title to the lands sought to be purchased by these interveners and cross-complainants, or any of them.

70. (313) The Court erred in not holding that the United States, complainant herein, was not entitled to a decree quieting and confirming in it the title to the lands sought to be purchased by these interveners and cross-complainants, or any of them,

71. (314) The Court erred in holding that the proviso in the amendatory act of April 10th, 1869,

was not a covenant, the acceptance and agreement to perform which was imposed by Congress as a condition precedent to the right of the Oregon and California Railroad Company to accept and become vested with the title to the lands under the grant of 1866.

72. (315) The Court erred in holding that the word "provided", introducing the proviso contained in the amendatory act of April 10th, 1869, imported a condition subsequent, as

(a) The word "provided" is as appropriate for the purpose of importing a condition precedent as a condition subsequent, and

(b) Said proviso is coupled with a clause in said act contained permitting the grantees to accept said grant one year after the passage of said amendatory act, and

(c) Said proviso is not coupled with and does not bear any relation to the granting clause in said act amended.

73. (316) The Court erred in not holding that the proviso in the amendatory act of April 10th, 1869, was and is a covenant, the acceptance and agreement to perform which was imposed by Congress as a condition precedent to the right of the

railroad company to accept and become vested with the title to the lands under the grant of 1866.

74. (317) The Court erred in refusing to direct and decree a specific performance on behalf of the United States, the complainant herein, and against the defendant, Oregon and California Railroad Company and the other defendants claiming by, through and under it, requiring said defendants to convey to these interveners and cross-complainants, the lands sought to be purchased by each, respectively, upon payment of the purchase price therefor.

75. (318) The Court erred in not holding that the defendant, Oregon and California Railroad Company and other defendants claiming an interest in said land, be required to convey said land to the interveners and cross-complainants applying to purchase the same.

76. (319) The Court erred in holding that the defendant, Oregon and California Railroad Company and each and all of the other defendants claiming an interest in said land, should not be required to convey said lands to the interveners and cross-complainants applying for the same.

77. (320) The Court erred in holding that Congress did not intend by the act of April 10th, 1869,

to give to actual settlers the right to compel the railroad company to sell to them the lands embraced within the grant of July 25th, 1866, according to the terms of the proviso in said act of April 10th, 1869.

78. (321) The Court erred in not holding that Congress intended, by the act of April 10th, 1869, to give to actual settlers the right to compel the railroad company to sell to them the lands embraced within the grant of July 25th, 1866, according to the terms of the proviso in said act of April 10th, 1869.

79. (324) The Court erred in refusing to direct and decree a specific performance on behalf of the interveners and cross-complainants and each of them, against the defendant, Oregon and California Railroad Company, and the other defendants claiming by, through and under it, requiring said defendants to convey to these interveners and cross-complainants, the lands sought to be purchased by said interveners and cross-complainants, respectively, as prayed for in their several bills.

80. (325) The Court erred in holding that the provisions in each and both of said grants did not constitute contracts entered into by and between the Government and the railroad company, for the

benefit of and enforcible by the interveners and cross-complainants.

81. (326) The Court erred in holding that the proviso in the amendatory act of April 10th, 1869, requiring sales to settlers, was not a covenant to a use and did not impress a trust upon said lands for the benefit of those, who in good faith should apply to make settlement upon said land, and to purchase the same in quantities and at prices provided by said amendatory act.

82. (327) The Court erred in not holding that the proviso in the amendatory act of April 10th, 1869, requiring sales to settlers, was a covenant to a use and impressed a trust upon said lands for the benefit of those, who in good faith should apply to make settlement upon said land and to purchase the same in quantities and at prices provided by said amendatory act.

83. (330) The Court erred in holding that the railroad company was not constituted a trustee for the benefit of the interveners and cross-complainants as *sestui que trustent,* under the provisions requiring sales of lands to settlers, referred to, in that

(a) "The nature and quality of their interests are not specific and definite," and, in that

(b) "They are not susceptible of identification as such," and

84. (331) The Court erred in not holding that the railroad company, by the provisions in said grants contained, was constituted a trustee for the benefit of the interveners and cross-complainants as *sestui que trustent,* as

(a) The nature and quality of said interests under said grants are sufficiently specific and definite, and

(b) Their application to purchase and offer to settle upon the lands, is a sufficient identification.

85. (332) The Court erred in holding that the offer and tender by the interveners and cross-complainants, to purchase the lands sought by them to be purchased of and from the Oregon and California Railroad Company, did not give to the respective interveners and cross-complainants a vested interest in said lands, in default of an acceptance of such offers and conveyances of said lands by the Oregon and California Railroad Company.

86. (333) The Court erred in not holding that the offer and tender by the interveners and cross-complainants, to purchase the lands sought by them to be purchased of and from the Oregon and Cali-

fornia Railroad Company, gave to the respective interveners and cross-complainants, a vested interest in said lands, in default of an acceptance of such offers and conveyances, by the Oregon and California Railroad Company.

87. (334) The Court erred in holding that the proviso in the act of April 10th, 1869, is not sufficiently definite and certain to be enforced as a covenant to a use or as a trust.

88. (335) The Court erred in not holding that the proviso in the act of April 10, 1869, is sufficiently definite and certain to be enforced as a covenant to a use or as a trust.

89. (336) The Court erred in holding that the proviso in the act of April 10, 1869, requiring sales to settlers, is sufficiently definite and certain as a condition subsequent, to entitle the Government to a forfeiture for its breach, and that it is not sufficiently definite and certain to be specifically enforced as a covenant to a use, or as a covenant creating a trust.

90. (337) The Court erred in not holding that the proviso in the act of April 10, 1869, for the sale of lands to actual settlers was intended by Congress

as and was and is a covenant to a use only, and not a condition subsequent, as

(a) Said proviso contains specific and direct commands which were assented to, and performance thereof promised, by the Oregon and California Railroad Company, and

(b) Said proviso does not contain any clause providing for forfeiture or re-entry for breach of such covenant, and

(c) Said contract devotes said land to settlement and tillage and ultimate ownership by settlers.

91. (338) The Court erred in holding that the proviso in the act of April 10, 1869, was not a covenant to a use, impressed upon and running with the title to the land, until the title should have ultimately become vested in an actual settler, upon the terms and under the conditions provided in said grant.

92. (339) The Court erred in not holding that the proviso in the act of April 10, 1869, was a covenant to a use, impressed upon and running with the title to the land, until the title should have ultimately become vested in an actual settler,

upon the terms and under the conditions provided in said grant.

93. (340) The Court erred in holding that the United States, complainant herein, had any right, title or interest in or to the land embraced within and covered by the East Side grant, or any part thereof, except as a settlor of the trust in said lands.

94. (349) The Court erred in holding that the United States, complainant herein, had any right, title or interest in and to the lands embraced within the East Side land grant, or any part thereof, which it could enforce in this action, except such rights as it has as a settlor of the trust in said lands, to enforce the provision of said trust, and such rights as it had and has to carry into effect in said suit, its public policies with relation to its granted lands, and

95. (350) The Court erred in not holding that this suit can only be maintained by complainant as one to compel the specific performance of a trust covenant, or to enforce a public policy, as

(a) Neither of said land grants contains a provision importing a condition subsequent, upon the breach of which, forfeiture could be had, and

(b) Congress has never declared a forfeiture of either of said land grants for breach of any condition subsequent, assuming that there is such condition in either of said land grants, and

(c) The fact of forfeiture has never been adjudicated by a court of law, and

(d) The defendant, Oregon and California Railroad Company, holds the legal title to and possession of said lands, and

(e) Complainant having asked for forfeiture and in the alternative for specifice performance, this suit cannot be maintained for forfeiture, since equitable relief may be granted by specific performance, and

(f) In view of specific performance a decree quieting title in the Government cannot be had.

96. (351) The Court erred in not holding, on the assumption that the said proviso in the act of April 10, 1869, is a condition subsequent, for breach of which forfeiture might be had, that complainant elected, by filing its suit in equity, to waive forfeiture, and elected to specifically enforce said proviso as a covenant to a use only.

97. (353) The Court erred in holding that the interveners and cross-complainants were not such actual settlers as were contemplated by the acts of April 10, 1869, and May 4, 1870.

98. (354) The Court erred in holding that these interveners and cross-complainants did not have vested interests in the lands sought to be purchased by them and each of them respectively, by reason of their various offers and tenders to purchase said lands upon the terms provided in the acts of April 10, 1869, and May 4, 1870.

99. (355) The Court erred in holding that the evidence in this cause was sufficient to entitle complainant to the decree rendered herein.

100. (356) The Court erred in not holding that the evidence in this cause is insufficient to support or sustain the decree rendered.

101. (357) The Court erred in holding that the evidence adduced in support of the complaint of the United States, complainant herein, was sufficient to entitle complainant to a forfeiture of the title to the lands sought to be purchased by these interveners and cross-complainants or any of them.

102. (358) The Court erred in not holding that the evidence adduced in support of the com-

plaint of the United States, complainant herein, was not sufficient to entitle complainant to a forfeiture of the title to the lands sought to be purchased by these interveners and cross-complainants or any of them.

103. (359) The Court erred in holding that the United States, complainant herein, was entitled to recover its costs and disbursements herein, or any costs or disbursements herein, against these interveners and cross-complainants, or any of them, and that a decree should be entered to that effect.

ARGUMENT

We have omitted from our Statement and from the Assignment of Errors all matters which alone relate to the "West Side Grant" for the reason that the clients which we represent are only interested in the so-called "East Side Grant."

CONDITIONS SUBSEQUENT

COMPLAINANTS' RIGHT TO FORFEITURE

ASSIGNMENT OF ERRORS HEREIN NUMBERED 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 40, 47, 99 AND 100

The crucial question presented by the Assignment of Errors above enumerated is as to the intendment of Congress as expressed by the clause contained in the amendment of April 10, 1869, which is as follows:

> "And provided, further, that the lands granted by the Act aforesaid shall be sold to actual settlers only, in quantities not greater than one-quarter section to one purchaser, and for a price not exceeding two dollars and fifty cents per acre."

We do not believe that this proviso was intended by Congress as a condition subsequent, for the reasons:

(a) That the proviso is not coupled with and does not relate to the granting clause, or any habendum clause of the grant, and

(b) It does not contain, and is not coupled with any language importing the consequence or penalty of forfeiture for its breach.

The Act of July 25, 1866, to which the Act of April 10, 1869, is amendatory, provided that the grantees should file their assent within one year after the passage of the act and complete the first twenty miles of railroad within two years, and the whole before July, 1875.

On June 25, 1869, this act was amended extending the time for building the road; on July 25, 1869, the amendatory act in question was passed.

It provides that Section 6 of the Act of July 25, 1866, be amended so that the railroad companies shall have one year from date of passage of the act to file their assent. * * * * * * *

> "And provided further that the lands granted by the act aforesaid shall be sold to actual settelers only," etc.

Section 8 of the act of July 25, 1866, provides that the title of the railroad companies to the land shall be forfeited, if they shall fail to file their assent or to build said road within the time allowed.

This Section 8 was not amended by the Act of April 10, 1869.

It seems apparent that if by the proviso in question, Congress had intended to engraft upon the title conveyed by the grant, a condition subsequent for breach of which, forfeiture might be had, it would certainly have amended Section 8 to so specifically provide. We contend that the rule *expressio unius est exclusio alterius* should be applied in interpreting the grant; that the grant should be read and interpreted as though the amendment of

April 10, 1869, were in fact a part of Section 6 of the original act, which in law it is.

The only thing there is in the grant or in this proviso which can be construed as importing a right of forfeiture by the Government is the word provided. This word provided does not always import a condition.

> "'This word hath diverse operations. Sometimes it worketh a qualification or limitation, sometimes a condition and sometimes a covenant.' Co. Lit. 146 B., 203 B." Cyclopedic Law Dictionary 739.

See also *Stanley vs. Colt,* 5 Wall (U. S.) 119.

And when this word imports a condition it does not always import a condition subsequent.

> "Domat says conditions are of three sorts, the first tend to accomplish the covenants, to which they are annexed. The second dissolve covenants, the third neither accomplish nor avoid, but create some change." Cyclopedic Law Dictionary, 184.

We contend that the proviso in question is a condition of the third sort which neither accomplishes a pre-existing covenant in the grant nor provides for its avoidance on breach, *but creates a change in the pre-existing covenant by requiring a certain disposal of the property conveyed.*

See *Stanley vs. Colt, supra.*

IF PROVISO IS CONDITION IT IS CONDITION PRECEDENT

NO RIGHT OF FORFEITURE

ASSIGNMENT OF ERRORS 71, 72, 73

We maintain that the word provided does not import a condition subsequent, but that it does import a covenant to be assented to by the grantees as a condition of their right to accept the grant.

We maintain that this is apparent for the reason that this proviso is not coupled with the granting clause or any habendum clause of the Act, and no reference to the granting clause or habendum is made in this proviso, but the proviso is coupled with and contained in the same paragraph and sentence with the amendment of Section 6 of the Act extending the time for acceptance.

The word provided, therefore, if it imports a condition at all imports a condition precedent.

In this connection it will be noted that the Act of May 4, 1870, granting land to the West Side Company contained the following proviso:

> "Sec. 4. That the said alternate sections of land granted by this Act, excepting only such as are necessary for the company to re-

> serve for depots, stations, side tracks, wood yards, standing grounds and other needful uses in operating the road, shall be sold by the company only to actual settlers in quantities not exceeding 160 acres or a quarter section to any one settler, or at a price not exceeding two dollars and fifty cents per acre."

It will be noted that this Act did not contain the word provided, neither is there in the Act any provision whereby the title will revert to the Government on breach.

While the Act of 1870 is not a part of the grant of 1866, its enactment is so closely associated with that grant that, as stated by the trial court, it should be considered *in pari materia.*

WHETHER PROVISO IS OR IS NOT A CONDITION IT IS A COVENANT

ASSIGNMENT OF ERRORS 44, 45, 46, 47 AND 49

This proviso requires the railroad company to sell the land to settlers. While it is negative in its form, it is also positive. The railroad company accepted the grant and agreed to be bound by its provisions.

If there is a doubt as to whether it is a condition subsequent or a covenant or both, the Court should construe it as a covenant.

> "It is not easy to say when a condition will be considered a covenant and when not, or when it will be holden to be both."
>
> Bouviers Law Dictionary, Vol. 1 p. 262.

In support of our claim that a condition subsequent and a covenant may be created by the same words, we cite:

Hall vs. Finch, 104 U. S. 261.

Platt on Covenants, 70, 71.

Elyton Land Co. vs. Smith, 100 Ala. 405.

Parmelee vs. Oswego, etc., R. Co., 6 N. Y. 80.

Country vs. Deek, 13 Abb. N. Cas. 111.

Paschall vs. Passmore, 15 Pa. St. 307.

Harting vs. Witte, 59 Wis. 292.

> "The same words may be employed to create a covenant as to create a condition, and if there is any doubt regarding the intention of the grantor or devisor, courts will incline toward the former construction, for conditions, which tend to destroy estates are not favored, and are strictly construed."
>
> 6 Amer. & Eng. Ency. of Law, 2nd Ed., p. 502, and note 9 citing many cases.

But the court has held in this case that the proviso is not positive but negative; that it does not require the railroad company to sell the land to settlers, but that it requires it to refrain from selling the land to others than settlers and to refrain from selling it in quantities greater than one quarter section.

We insist that this holding cannot bear the light of reason. We contend that the purpose of Congress was to compel the railroad company to sell the land to settlers in small quantities.

Even if the words of the proviso were not sufficient to show this purpose, the purpose of Congress may be shown by words and acts of Congress, *in pari materia.*

U. S. vs. Union Pacific R. R. Co., 91 U. S. 72.
Holy Trinity Church vs. U. S., 143 U. S. 457.

In the latter case the court said:

> "Another guide to the meaning of a statute is found in the evil which it was designed to remedy; and for this the court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body."

Mr. Julian, who procured the adoption of the proviso in question, as an amendment to the Act of

April 10, 1869, a short time before said Act was adopted, in explaining to Congress the purpose of an amendment to another act, in exactly the same language, said: "This will avoid the complete monopoly of the lands, as sanctioned by the old system of land grants, and at the same time devote to settlement and tillage the odd numbered sections," etc.

If the proviso were to be construed only as a negative covenant, it is apparent that the railroad company might monopolize and hold these lands indefinitely and the purpose of Congress to devote it to settlement and tillage would be as completely frustrated as though the railroad company had sold to one person the entire grant.

AS TO THE PURPOSE AND EFFECT OF JOINT RESOLUTION OF CONGRESS OF APRIL 30, 1908

ASSIGNMENT OF ERRORS HEREIN NUMBERED 39, 39, 50, 51 AND 52

In the resolution adopted by Congress April 30, 1908, Congress expressly declared that it was not intended thereby to determine "the right of the

United States to a forfeiture." By this resolution Congress not only *did not declare a forfeiture, but expressly stated that it did not even intend by the resolution to determine its right to do so.*

The Attorney-General could not declare a forfeiture. The legislative body alone can do so.

State of Minn. vs. Duluth & I. R. R. Co., 97 Fed. Rep. 353.

A legislative declaration of forfeiture to be effective must be clear and unambiguous.

State of Minn. vs. Duluth & I. R. R. Co., Supra.

AS TO THE JURISDICTION OF THE COURT TO DECLARE OR DECREE FORFEITURE

ASSIGNMENT OF ERRORS HEREIN NUMBERED 35, 36, 37, 64, 65, 66 AND 67

Courts of Equity will not lend their aid to forfeiture. "Equity abhors a forfeiture" is a familiar maxim. This principle is so well known and so well established that the citation of authority is wholly unnecessary. The maxim is as true, and as applicable where the Government is a party as in case of a private suitor.

Brent vs. Washington Bank, 10 Pet. (U. S.) 596.

U. S. vs. U. P. R. R. Co., 105 U. S. 263.

IF JURISDICTION INHERED THE DECREE IS INEQUITABLE

ASSIGNMENT OF ERRORS 41, 42, 43 AND 96.

Assuming for the purpose of the discussion that the proviso is in form a condition subsequent, still forfeiture is inequitable, for the reasons:

(a) It divests the railroad company of its vested interest to the extent of $2.50 per acre in the land.

(b) It deprives the interveners of their just rights and divests their vested interests.

(c) It frustrates the purpose of the grant.

In the suit at bar the court had the means at hand to carry into effect every provision of the law and do equity between all parties, without lending its aid to forfeiture.

A provision in the form of a condition may be specifically enforced as though it were a covenant without forfeiture, and its performance is in fact the very reverse of a forfeiture.

Pomeroy's Equity Jurisprudence, Vol. 1, 50, note 2.

Livingston vs. Sickles, 8 Page 398; 7 Hill 253.

Carpenter vs. Callin, 44 Barb. 75

Leach vs. Leach, 4 Ind. 628.

And in order that a forfeiture may be avoided and justice promoted, equity will frequently regard a condition subsequent as a trust and specifically enforce it for the benefit of third persons.

Tiffany on Real Prop., Vol. 1, p. 185, and note.

Tomlin vs. Blunt, 31 Ill. App. 234.

Smith vs. Jewett, 4 N. H. 530.

1 *Smith's Leading Cases,* 142.

West vs. Bescoe, 10 Md. 460.

The case of *Smith vs. Jewett, supra,* was one in which land was devised by will to the widow, upon the condition subsequent, that the widow support two daughters of the testator.

Upon condition broken the heirs brought suit in equity for a forfeiture, also praying for other relief. The widow admitted in her answer that she

had broken the condition in the will. The court, however, refused to entertain suit for forfeiture, but suggested that if the parties saw fit to so frame their pleadings that specific performance might be decreed to compel the widow to maintain the daughters, such relief might be granted.

The theory upon which courts of equity specifically enforce a condition subsequent as a covenant is that the language of the condition imports a covenant as well, and to avoid a forfeiture of the condition they specifically enforce the covenant.

The maxim "he who seeks equity must do equity" has been held specifically applicable to the United States when a suitor.

Brent vs. Washington Bank, 10 Pet. (U. S.) 596.

TRUST RELATIONSHIP—VESTED RIGHTS —EQUITY IN INTERVENTION BILLS

ASSIGNMENT OF ERRORS HEREIN NUMBERED 1 TO 24 INCLUSIVE, 48, 74 TO 77 INCLUSIVE, 79 TO 95 INCLUSIVE, 97, 98, 101, 102 AND 103

The proviso in the amendment of April 10, 1869, is in the following language:

> "And provided, further, that the lands granted by the Act aforesaid, shall be sold to actual settlers only, in quantities not greater than one-quarter section to one purchaser, and for a price not exceeding two dollars and fifty cents per acre."

This proviso is, of course, primarily a law, and should be carried into effect according to the intent of Congress, as heretofore shown. This being true, it would be unnecessary to determine what kind of conveyance it is, according to the common law classification, but for the fact that we must, of necessity, do so in order to determine what it does.

The only theory upon which a law can operate to convey an estate in property is, that the proposal in the law is a promise or covenant. The promise or covenant may be of such nature, that he who brings himself within the provision of the law, becomes seized of a legal estate in the lands proposed by the law to be conveyed, or it may be of such a nature that he who brings himself within the provisions of the law, becomes seized of a legal estate in the lands proposed by the law to be conveyed, or it may be of such a nature that he who brings himself within the provision of the law be-

comes vested with an equitable estate to which another is conveyed a legal estate for his benefit.

Whether or not this proviso is, or is not, in the form of a condition subsequent, or whether it could or could not, under proper circumstances and in a proper case, operate to defeat the title of the railroad company, is not, as we have heretofore shown, material in the consideration of this appeal.

The interveners have secured vested rights by the operation of the same law that gave the railroad company title to the land, and the court has, by its orders and decrees, deprived them of these rights.

That a vested interest in property conveyed by a public grant may be acquired by a grantee, by bringing himself within the purview of the law, after its enactment, has been very frequently held.

> 26 *Am. & Eng. Ency. of Law,* 221 and note 2, citing many cases decided by the United States and many of the state courts.

That the proposals in the law when accepted become contracts and within the protection of the Federal Constitution, has also been frequently held.

> 26 *Am. & Eng. Ency. of Law* (2nd Ed.), 222; note 1.

The grant in the case at bar is a three party contract between the Government, the railroad company and the interveners.

It is well established that where a grant is made charged with a trust, the interest which the *cestui que trust* has under the grant may sustain it against legislative interference, a vested equitable interest being property in the same sense and entitled to the same protection as a legal interest.

Cooley on Con. Lim., 344, Note 1. Also page 333 and cases cited Note 1.

Trustees of Dartmouth College vs. Woodward, 4 Wheaton (U. S.) 518.

It has been frequently held that where one who had a right to acquire property by performing certain acts as provided by law, had tendered performance and performed as far as permitted, he acquired a vested interest in the property.

Beaty vs. Sale, 92 Am. Dec. 128.

Claimants vs. Warner, 24 How. 394.

Gaugh vs. Dorsey, 27 Wis. 119.

Shipley vs. Cowan, 91 U. S. 330.

In the last case above cited, the plaintiff had settled upon and applied to purchase a pre-emption

claim, but the officers of the land office declined to accept proofs on the grounds that the land had been reserved for another.

The court held that the plaintiff had vested rights which were not and could not be defeated by the refusal of the officers to recognize them.

These interveners claim that they have vested interests in the real estate applied for by them, respectively, which Congress itself could not by act of forfeiture or otherwise, lawfully divest, and that the orders and decrees herein appealed from infringes these rights.

A vested right is an immediate fixed right of present or future enjoyment.

6 *Am. & Eng. Ency. of Law,* 956.

Kent's Com., 202.

It is also defined as a title, legal or equitable, to the present or future enjoyment of property, or to the present or future enforcement of a demand, or a legal exemption from a demand made by another.

Cooley on Const. Lim., 438.

A vested right of action is property in the same sense that tangible things are property.

Cooley on Const. Lim., 343.

That the proviso is in fact a covenant, which gives rise to a trust, and that the interveners, by offering to comply with, and in so far as they are permitted, complying with, the law, have brought themselves into relation therewith as *cestuis que trustent,* and as such, have vested interests in the various tracts of land for which they have, respectively, applied, we shall now proceed to show.

> "A trust may be defined as an obligation arising out of a confidence reposed in one who has the legal title to property conveyed to him, that he will faithfully apply and deal with such property according to the confidence reposed."

28 *Am. & Eng. Ency. of Law* (2nd Ed.), 858.

This is in the nature of a public trust and the railroad company holds title for the benefit of a particular class of people.

> "A public, or charitable, trust is one constituted for the benefit of the public at large or of some considerable portion of it answering a particular description."

28 *Am. & Eng. Ency. of Law* (2nd Ed.), 855.

We have, in the present case, all of the circumstances which give rise to a valid trust.

"For the creation of a valid trust, three circumstances must concur: first, a definite subject-matter within the disposal of the settlor; second, a lawful definite object to which the subject-matter is to be devoted; third, clear and unequivocal words or acts, devoting the subject-matter to the object of the trust."

28 *Am. & Eng. Ency. of Law* (2nd Ed.), 865, 866.

The definite subject-matter within the disposition of the settlor—the Government—is the land within the grant; the lawful, definite object to which the land, the subject-matter is to be devoted, is settlement and ownership by settlers, in small quantities; the words and acts devoting the subject-matter to the lawful object are the words in the proviso in question, viz.:

"That the lands granted by the Act aforesaid shall be sold to actual settlers only, in quantities not greater than one-quarter section to one purchaser, and for a price not exceeding two dollars and fifty cents per acre."

We claim that these words are sufficient to create a trust.

"The creation of a trust requires no prescribed form of words, and any expression which evinces the settlor's present intention to place his beneficial interest in specified property absolutely beyond his control, for the bene-

> fit of some person or object, is enough, and even precatory words, if, as a whole, the intention appears that they are intended as imperative, will create a valid trust."

28 *Am. & Eng. Ency. of Law* (2nd Ed.), 866.

But, even if the words of the proviso were not sufficient to show this purpose, the purpose of Congress may be shown by words and acts of Congress, *in pari materia.*

U. S. vs. Union Pacific R. R. Co., 91 U. S. 72.

Holy Trinity Church vs. U. S., 143 U. S. 457.

In the latter case the court said:

> "Another guide to the meaning of a statute is found in the evil which it was designed to remedy; and for this the court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body."

As we have heretofore said.

Mr. Julian, who procured the adoption of the proviso in question, as an amendment to the Act of April 10, 1869, a short time before said Act was adopted, in explaining to Congress the purpose of an amendment to another act in exactly the same language, said: "This will avoid the complete monopoly of the lands, as sanctioned by the old system of land grants, and at the same time devote to set-

tlement and tillage the odd numbered sections," etc.

If the purpose of Congress was to "devote to settlement" the land conveyed by the grant, a trust was in fact created.

> "If a contract creates interests distinct from the legal ownership of the property involved, or if a contract, being lawful and enforcible, is made with the intention of devoting specific property to specific purposes, equity, in order to give effect to the rights created or to the intention of the parties, will raise a trust in the property enforcible against the holder of the legal title and those claiming under him voluntarily or with notice."
>
> 28 *Am. & Eng. Ency. of Law* (2nd Ed.), 904-5.

But the trial court has held that this proviso cannot be enforced as a trust because the language is too meager.

> "Where the language states in general terms the purpose of the grantor to have the grantee do some act for the benefit of a third party, it is sufficiently definite and will be enforced."
>
> In *re Smith's Estate,* 144 Pa. 428.

The court has held also that even though the proviso reflects the general purpose of Congress, that it cannot be enforced as a trust for the reason that the beneficaries are not pointed out with sufficient certainty.

We assert that the people to be benefited by this Act are sufficiently defined.

In the case of *ex parte Lindley,* 32 Ind. 367, the following was held sufficiently definite:

> "A devise to the education of the colored children in the State of Indiana."

In the case of *Chapin vs. School Dist.,* 35 N. H. 444, the following language was held sufficiently definite:

> "The inhabitants of the second school district in Winchester."

In *Perrin vs. Carey,* 65 U. S. 465, the following was held to be sufficiently definite:

> "To the support of the poor white male and female orphans neither of whose parents are living."

In *Jones vs. Habershaw,* 107 U. S. 174-191, the following was held sufficiently definite:

> "To one or more Presbyterian or Congregational churches in the State of Georgia in such destitute and needy localities as the proper officers of said independent church may select, so as to promote the cause of religion among the poor and feeble churches of the state." * * * "For the relief of distressed widows, and the schooling and maintaining of poor children." * * * "For the relief of indigent widows and orphans in the City of Savannah."

In the case of *Vidal vs. Gerards,* Exec., 2 How. (U. S.) 125, the following was held sufficient:

> "As many poor white male orphans between the age of 6 and 10 years as the income shall be adequate to maintain."

In *Trustees of Dartmouth College vs. Woodward,* 4 Wheat. (U. S.) 512, the following:

> "To the students who should attend the college."

In the case of *Tomlin vs. Blunt et al.,* 31 Ill. App. 234, the following was held sufficient:

> "Evangelical Order of Christians."

In view of the fact that forfeitures are never favored and are only granted even in courts of law, when the right thereto is definite and certain, and that trust covenants should be interpreted and enforced to effectuate their purpose, it seems strange to us that the trial court could find that this proviso was sufficiently definite so that a forfeiture might be had for its breach, and yet not sufficiently definite to enforce specifically.

In other words, was not the trial court first required to determine, and did he not determine, what the railroad company should do before he could determine or did determine that it had

breached the covenant in the grant? And if the language of the grant is sufficiently definite so that he could determine what it should do to comply with the grant, could he not as well have required the company so to do, as to divest it of title for breach?

The Oregon and California Railroad Company by accepting and agreeing to be bound by the Act of July 25, 1866, and the amendments thereto, and stating in its articles of incorporation and the conveyance by which it acquired title from the Oregon Central Railroad Company to the grant, that it was organized for the express purpose and with the express intention of complying with the terms of the grant *and amendments thereto,* impressed upon the granted lands a trust which may be enforced by these interveners, independent of any right which the Government might have to enforce the terms of the grant.

> "The settlor may, without parting with the possession of the subject-matter of the trust, himself assume the character of trustee, with respect to property already owned by him, or upon the acquisition of property in pursuance of a previous agreement. *It is not necessary that this be done in express terms,* but in the absence of statutory requirements *any words or acts are sufficient which clearly denote his*

intention to relinquish his beneficial interest in the property in presenti and to hold it for the benefit of another, and this without regard to whether the property is equitable or legal or whether it is capable or incapable of transfer at law."

28 *Am. & Eng. Ency. of Law,* 898, and Note 11, citing cases from England, U. S., Alabama, California, Connecticut, Georgia, Illinois, Kentucky, Maine, Maryland, New Jersey, New York, Pennsylvania, Rhode Island, South Carolina and Vermont.

And

"If a trust has been once perfectly created with an intelligent comprehension of the nature of the act, it is irrevocable, even though it be voluntary, and the subsequent acts of the settlor or the trustee cannot affect it."

28 *Am. & Eng. Ency. of Law* (2nd Ed.), 899, and Note 7, citing many cases from England, Canada, United States, California, Illinois, Indiana, Kentucky, Maine, Maryland, Massachusetts, New Hampshire, New York, Pennsylvania, Rhode Island, South Carolina, Vermont and West Virginia.

And equity will aid a volunteer beneficiary in enforcing his trust even though the settlement of the trust were gratuitous.

28 *Am. & Eng. Ency. of Law* (2nd Ed.), 889-90, and Notes 1 and 2.

And the settlor of the trust may himself compel specific performance in a court of equity.

Chapman vs. James, 4th Ore. 362.

Warren vs. The City of Lyons, 22 La. 357.

Abbott vs. Gregory, 39 Mich. 68.

Gressom vs. Hill, 17th Ark. 483.

And the trust may be declared by a separate instrument from the one conveying or describing the estate.

28 *Am. & Eng. Ency. of Law* (2nd Ed.), 900.

And where the trustee refuses or neglects to carry out the terms of the trust the beneficiary may compel performance.

28 *Am. & Eng. Ency. of Law* (2nd Ed.), 1121, and Note 7, citing many cases.

As we have heretofore shown, the declaration of trust is sufficient if it shows the intention of the settlor.

28 *Am. & Eng. Ency. of Law* (2nd Ed.), 866.

We insist, therefore, that this trust should be construed as an executed trust, that is, as sufficiently

defining the right of the *cestuis que trustent,* and the responsibility of the trustee, when the intent and purpose of Congress, gleaned from its acts and proceedings *in pari materia,* are considered in connection with the words of the proviso.

The intent and purpose of Congress was, no doubt, as heretofore shown, that the settlor should have the right to settle upon the land and purchase any amount that he saw fit, not to exceed one-quarter section, by paying to the railroad company the largest amount which the railroad company had a right to charge for the land.

To construe the law otherwise would be, to make it ineffectual to accomplish the purpose for which it was designed, and would not "avoid the complete monopoly" of the lands. For if the railroad company had a right to refuse to sell to A, it would likewise have a right to refuse to sell to B and C, and so on *ad infinitum.* Likewise if it had a right to refuse to sell 160 acres, it would have a right to refuse to sell 80 acres or 40 acres or any other given amount, and would have a right to refuse to sell any land whatever.

Therefore, the purpose and intention of Congress can only be made effectual, and the complete

monopoly of the lands avoided, only, by giving the settler the right to purchase the largest amount by tendering the highest price within the limits of the law.

The trust instrument must be construed to carry into effect the purpose of the settlor of the trust.

> "In construing instruments creating or declaring trusts, the rule is that the intent of the parties controls and that the substance and effect of the instrument as a whole must be considered, and its mere form will be disregarded."

28 *Am. & Eng. Ency. of Law,* 910, and Note 10.

As we have heretofore shown, this is especially true where the trust is created by a congressional grant as the grant is a law as well as a conveyance, and must be so construed, solely with a view to promote the purpose of Congress.

And where the instrument is susceptible of two constructions, the construction which will best carry out the general scheme of the trust, will be adopted.

Dexter vs. Episcopal City Mission, 134 Mass. 394.

But if the court should construe the law otherwise and hold that the trust was an executory trust which gave the railroad company the right to exercise a discretion as to the amount of land within the quantitative limit fixed by the law, which it should sell to each settler, these interveners would still have a standing before this court, and would be entitled to the relief asked.

> "A court of equity has inherent power to take upon itself, through its officers or agents, the execution of the powers and duties of a trust, upon the failure or refusal to act of the duly appointed trustee," etc.

28 *Am. & Eng. Ency. of Law,* 1098-99.

> "When the court is called upon to execute the trust, it will not generally attempt to exercise discretionary powers conferred upon the trustee. But it may, in a proper case, order a reference to determine what course of action will be beneficial to all parties interested."

28 *Am. & Eng. Ency. of Law,* 1098.

And it has been held that when a trustee of an executory trust refuses to exercise the discretion with which he is vested, in bestowing the benefits of the trust upon the *cestui que trust,* he will be compelled to bestow the largest benefit permitted by the terms of the trust.

Young vs. Young, 1 Jurist, 840.

The defendant railroad company contends that the proviso requiring the railroad company to sell the land to settlers for $2.50 per acre, in quantities not greater than one-quarter section, being a covenant, is "unenforcible by the cross-complainants and interveners because they are third parties to it."

A person for whose benefit a covenant is made may enforce the same, though not a party to the agreement.

11 *Cyc.,* 1095, and Note 37.

And he may do this though there may be no provision of the code expressly authorizing such action.

Douglass vs. Mobile Branch Bank, 19 Ala. 659.

Ducan vs. Moon, Dudley (S. C.) 332.

Johnson vs. McClung, 26 W. Va. 659.

But Section 27 of Chapter 3 of the Code of Oregon, expressly providing that "actions shall be prosecuted in the name of the real party in interest," authorizes any person for whose benefit a contract is made, to sue thereon.

Hughes vs. O. R. & N. Co., 11 Oregon 439.

Baker vs. Elgin, 11 Or. 333.

Chrisman vs. State Ins. Co., 16 Or. 388.

Strong vs. Kamm, 13 Or. 172.

Feldman vs. McGuire, 34 Or. 311.

And the beneficiary may sue even though he was not informed of the contract until after it was made.

Schneider vs. White, 12 Or. 503.

And the real party in interest may enforce his rights though he has acquired his rights without consideration.

Gregoire vs. Rourke, 28 Ore. 275.

And it has been frequently held that codes of a state conferring right of action, might be taken advantage of in suits in the federal courts within the state.

Holland vs. Challen, 110 U. S. 15.

Wehman vs. Conklin, 155 U. S. 314.

That the interveners are real parties in interest, we have heretofore shown.

For the foregoing reasons these interveners maintain that the orders and decrees heretofore

entered against them should be reversed and set aside, and that they should be given the relief prayed for in their bills.

Respectfully submitted,

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